Office - Supreme Court, U. S.
FILED
DEC 24 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 644.

WILLIAMS-BAUER CORPORATION and CONTI-WILLIAMS CORPORATION,
Petitioners,

vs.

GIOROLOMO DEPASQUALE, JOSEPH CIMINNA and WILLIAM MORTON,
Respondents.

Brief for the Respondents in Opposition to Petition for Writ of Certiorari.

GEORGE M. ARONWALD,
Counsel for Respondents,
Office & P. O. Address,
No. 305 Broadway,
Borough of Manhattan,
City of New York.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
The Statute Involved	2
Statement	2
Argument	3
POINT I.—The decision of the Circuit Court of Appeals is not in conflict with a decision of the Fifth Circuit. This Court will not review evidence or inferences drawn from it	3
POINT II.—A plea by way of defense of accord and satisfaction will be rejected unless facts are alleged which show that an honest dispute existed between the parties	4
POINT III.—A defense of account stated is invalid and will not defeat the right of an employee to recovery under the Act	5
CONCLUSION	6

CASES CITED.

PAGE

Brooklyn Savings Bank v. O'Neill, 65 S. C. 895 .. 5

General Talking Pictures Corp. v. Western Electric, 304 U. S. 175 4

Jax Beer Co. v. Redfern, 124 Fed. 2d| 172 3

Picket v. Union Terminal Co., 33 Fed. Supp. 244 .. 5

Simmons v. Rudolph Knitty Mills, 37 N. Y. S. (2) 422 5

Wilkinson v. Noland, 40 Fed. Supp. 1009 5

STATUTES CITED.

Judicial Code, Section 240 (a) as amended by Act of February 13, 1925 1

U. S. Code, Act of June 25, 1938, C. 676, 52 Stat. 1060 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

WILLIAMS-BAUER CORPORATION and CONTI-WILLIAMS CORPORATION, *Petitioners,* vs. GIOROLOMO DEPASQUALE, JOSEPH CIMINNA and WILLIAM MORTON, *Respondents.*	No. 644.

Brief for the Respondents in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinion of the District Court (R. 467-468) is not officially reported. The opinion of the Circuit Court of Appeals (R. 475) is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 2, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The primary questions presented are whether the defense of Account Stated may be asserted in an action brought pursuant to the Fair Labor Standards Act of 1938, and the sufficiency of the plea of Accord and Satisfaction. The petitioner also asks for a review of the fact questions which were presented to the jury in the District Court that were resolved in favor of the respondents.

The Statute Involved.

The original statute, before being incorporated into the United States Code was the Act of June 25, 1938, C. 676, 52 Stat. 1060. The statute is known as the Fair Labor Standards Act of 1938 and for the purpose of brevity will be hereinafter referred to as the "Act", or the "Statute."

Statement.

This case arose as an action brought by the respondents under the Act. The facts are relatively simple. Respondents, employees of the defendants, claimed unpaid overtime compensation. Each was employed as a salvage worker at an incinerator plant in Brooklyn, N. Y. Petitioner, Williams-Bauer Corp. operated the plant until July, 1942. Thereafter Conti-Williams Corp. became the successor operator. For practical purposes no change in the method of operations was effected thereby.

Respondent, DePasquale worked a minimum of 70 hours per week, but was paid according to petitioner's records for substantially less. Morton worked no less than 63 hours per week, but was paid for substantially less. Cimmna when paid $14.00 per week or more worked a minimum of 53 hours per week. The jury by their verdict believed the plaintiffs.

The petitioners' answer admitted that the respondents were engaged in the production of goods for commerce

and that the activities of the said employees were necessary for such production.

It should be noted that the petitioners failed to keep or produce upon the trial such records as they were required to preserve under Section 11c of the Act.

Argument.

Petitioners urge the following reasons for the granting by this Court of a writ of certiorari:

(1) The Circuit Court erred in holding that the defense of Account Stated is invalid and may not be pleaded.

(2) The Circuit Court erred in holding that the defense of Accord and Satisfaction is invalid where only conclusions of fact were pleaded.

(3) The Circuit Court erred in refusing to review the facts passed upon by the jury.

It is submitted that there is no substance to any of these alleged reasons and in support of our position that the writ should be denied, we submit the following points, varying the sequence of petitioners' points in the interest of clarity.

POINT I.

The decision of the Circuit Court of Appeals is not in conflict with a decision of the Fifth Circuit. This Court will not review evidence or inferences drawn from it.

The holding of the Fifth Circuit is not in point. The case relied on by petitioners is *Jax Beer Co.* v. *Redfern*, 124 Fed. 2d 172. There the plaintiffs did not testify as

to a minimum number of hours of work in each week, but testified to an approximate number. Moreover, plaintiffs were unable to calculate the salary due and received during the disputed period. The opinion points this out as follows:

> "Neither plaintiff was able to testify as to the number of hours worked each day, but each testified 'on an average' they worked from 7 in the morning until 9 o'clock at night. Redfern was unable to testify * * * as to the amount of salary, including commissions, that he received during the disputed period."

This is not the situation presented at bar. The respondents herein testified to a minimum number of hours of work in each week and the petitioners' records were used to indicate the salary paid them in that period.

The ruling of the Court below is not in conflict with any decision of this Court, nor with any decision of any other Circuit Court of Appeals. The granting of a writ of certiorari is not warranted merely to review evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric,* 304 U. S. 175.

POINT II.

A plea by way of defense of accord and satisfaction will be rejected unless facts are alleged which show that an honest dispute existed between the parties.

As was pointed out by the Circuit Court the defense failed to plead adequate facts. Conclusions were pleaded without any facts to support them. Although petitioners do not raise the question it is well to note that they

pleaded in addition to the defense of Accord and Satisfaction as a bar to this action, the defense of release (R. 21). It clearly appears therefore that that defense had the effect of reducing the sum of money due the employee. Such a defense was rejected by this Court in *Brooklyn Savings Bank* v. *O'Neill,* 65 S. C. 895 and does not now present a substantial question of federal law to be settled by this Court.

POINT III.

A defense of account stated is invalid and will not defeat the right of an employee to recovery under the Act.

The employers' obligation to pay wages and overtime to its employees is not exclusively the private concern of the parties but is regulated by Statute passed in the public interest. The objectives of the Act and the methods employed to attain them may not be set at naught.

Wilkinson v. *Noland,* 40 Fed. Supp. 1009.

The Act is clear and mandatory. Nothing that the employer or employee may do contrary to its terms can be availed of to prevent the enforcement thereof. It was written in the interest of the employees.

Picket v. *Union Terminal Co.,* 33 Fed. Supp. 244.

The Courts have consistently refused to permit a circumvention thereof by whatever guise the employer might attempt.

Simmons v. *Rudolph Knitty Mills,* 37 N. Y. S. (2) 422.

What is attempted by this defense is a circumvention of the provisions of the Act which the Courts will not tolerate. No novel, new or important question of Federal Law is presented which should be settled by the Supreme Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

GEORGE M. ARONWALD,
Counsel for Respondents.